

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1326

To be argued by
HENRY WINESTINE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

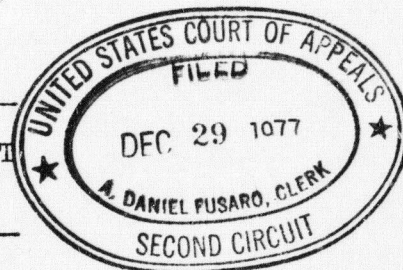
-against-

FRANK MANGAN and
KEVIN MANGAN,

Defendants-Appellants.
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B p/s
Docket No. 77-1326
Docket No. 77-1339

REPLY BRIEF FOR APPELLANT
FRANK MANGAN



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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FRANK MANGAN and
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KEVIN MANGAN,
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Defendants-Appellants.
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Docket No. 77-1326
Docket No. 77-1339

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant Frank Mangan submits this reply brief in response to the government's brief on his appeal.

HEARSAY DECLARATIONS OF AN ALLEGED CO-
CONSPIRATOR WERE ERRONEOUSLY ADMITTED.

The government argues that there was adequate non-hearsay evidence in the record to show that Frank Mangan was a member of the conspiracy. The principal evidence in that respect, as

the government notes (GBr 13)* is the opinion of the handwriting expert that the fraudulent returns were written in the same handwriting as Frank Mangan's tax returns and the material in his IRS personnel file, and his purchase of \$12,000 worth of securities in 1962, in addition to the fact of his employment as an IRS employee at the time the fraudulent returns were filed.

We submit that this evidence was insufficient, particularly in view of the weakness of the expert's testimony and his failure to use the voluminous exemplars provided by Frank at the government's request. The government's brief declines to discuss the obvious result which would follow if appellant prevails, as we believe he must, on any of the other issues raised on this appeal. If Frank's tax returns were admitted in violation of the Tax Reform Act of 1976, if they were not properly authenticated as being in his handwriting, or if the evidence of "wealth" inferred from stock purchases was inadmissible, then the non-hearsay evidence was utterly inadequate.

Appellant's argument that the hearsay declarations made by Kevin Mangan to John Bertsch were not in furtherance of the conspiracy is met by the assertion that this issue was not raised at trial (GBr 14) and that the declarations in any case were in

* References preceded by "GBr" are to the government brief.

furtherance of the conspiracy because "Frank Mangan worked for the IRS and . . . fraudulent returns were filed. . . . and most importantly, Bertsch himself participated in and accompanied Kevin Mangan in the execution of his part of the scheme" (GBr 14-15). This response is unrelated to the issue. A mere recital of the facts of a criminal scheme to a third party is not in furtherance of it. To be in furtherance of it, the declaration must advance or help forward the enterprise. There is no evidence in the record to support such a conclusion although the burden of proof was on the prosecution. The government contends that the declarations were made by Kevin in his effort to induce Bertsch to join the conspiracy (GBr 15). No citation to the record is given for this statement of fact, and none is to be found. That Bertsch may have joined months later lends no support to the thesis that the earlier statements were made with that goal in mind.

The government dismisses the contention that Kevin's purported statement of his intention to cheat Frank was not in furtherance of the conspiracy with the platitude that there is no honor among thieves, and points out that the purpose of the conspiracy was to defraud the United States (GBr 15). This confuses the ultimate goal of the conspiracy with the conspiracy itself. A conspiracy is an agreement among wrongdoers. It is

furthered by acts which advance the joint venture. If one member decides to commit the wrongful act alone and keep the proceeds for himself, he is not furthering the conspiracy in any sense, and he is no longer acting as agent for his henchmen - a necessary condition for the admission of the hearsay. The government's brief carefully avoids facing this issue.

The government's brief argues that the statements were alternatively admissible as declarations of his intentions, and therefore not hearsay (GBr 15, n.). That may be true to the extent the jury considered the statements against Kevin, but with respect to Frank, the proposition raises an insurmountable problem under Bruton v. United States, 391 U.S. 123 (1968).*

A review of the record indicates that the defense did not expressly ground its objection to the hearsay on the contention that it was not in furtherance of the conspiracy. Appellant urges that the issue must be treated as plain error in view of the fact that the hearsay was probably the most damaging evidence adduced at trial against appellant.

* In this regard it is significant that a pre-trial motion by Frank Mangan for severance was denied.

POINT II

HANDWRITING EXEMPLARS WERE NOT AUTHENTICATED.

The government argues that the tax returns and material from appellant's IRS personnel file were adequately authenticated. It relies upon the nature and contents of the documents plus the place of custody (GBr 18-20). The argument would be convincing if the issue was whether the tax returns and personnel file were genuine, but that is not the question. The issue is the authenticity of the handwriting. There can be no inference that the body of the tax returns was written by Frank Mangan since it is common knowledge that returns are often filled out by persons other than the taxpayer. The personnel file (Gx 43) contains a variety of writing. Some is in script, some in handwritten block printing, and a great deal is typewritten.

The government apparently adopts the statement in Weinstein, EVIDENCE ¶901(b)(4)[01] at 901-47 that Wigmore is wrong in asserting that contents alone will not authenticate a document (GBr 19). Weinstein's opinion is an expression of the view of a commentator, and is entitled to consideration. It finds no support in the Rules or in the cases, however. Weinstein cites as authority only subdivision (a) of Rule 901, which states that authentication is satisfied by evidence "sufficient to support a finding that the matter in question is what its proponent claims." That certainly justifies no doctrine of self-authentication, and if anything suggests a substantial burden of proof to be borne by the proponent of such evidence.

The government also would find support in Rule 901(b)(4) which gives as an example of authentication evidence "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." The last phrase, "taken in conjunction with circumstances," refutes any claim that documents may be self-authenticating. And in this case there were no circumstances shown which were sufficient to establish that the documents were written by Frank Mangan.

POINT III

APPELLANT'S TAX RETURNS WERE DISCLOSED AND ADMITTED IN EVIDENCE IN VIOLATION OF THE TAX REFORM ACT OF 1976.

In seeking to avoid the strictures on disclosure of tax returns in non-tax proceedings under 26 U.S.C. §6103(i), the government strenuously argues that this case involves tax administration and is governed by 26 U.S.C. §6103(h). However, it does not face the question of its compliance with the burdens of subsection (h).

Before a tax return is disclosed to the Department of Justice, disclosure must be authorized by the "Secretary", 26 U.S.C. §6103 (h)(3). The term "Secretary" is defined as the Secretary of the Treasury or his duly authorized delegate, 26 U.S.C. §7701(11) and

(12). The government casually asserts that the statutory definition of "Secretary" is intended "to provide for the broadest possible delegation of such power to subordinate IRS officials by the Secretary of the Treasury ... and therefore encompasses the referral made in this case" (GBr 24, n.).

Delegation of power by the Secretary of the Treasury is not made by implication, nor may an intent be inferred to provide for the "broadest possible delegation." On the contrary, elaborate regulations were promulgated relating to disclosure under §6103, Treas. Reg. §301-6103(a)-1. All delegations of authority by the Secretary are to specific delegates named in Commissioner's Delegation Orders. The delegation of power under §6103(h) is found in Com. Del. Order No. 156 sub. 2, 1976 CCH Fed. Tax Rep. ¶6666. The persons delegated the power in question are: Regional Commissioners, the Assistant Commissioner (Compliance), District Directors, Service Center Directors, the Director of International Operations and the Chief, Disclosure Staff. Redelelegation is permitted only to Assistant District and Service Center Directors, Assistants to the District and Service Center Directors, Division Chiefs, Assistant Chief, Disclosure Staff and Disclosure Officers. The tax inspector who took it upon himself to turn over the tax returns in this case was clearly not one of the named officers.

In its argument relating to the applicability of §6103(i) concerning disclosure in nontax matters, the government points to the provision of paragraph (4) of subsection (i) which states that

The admission into evidence if any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding.*
(GBr 23, continuation of note).

For the purpose of this case the crucial words are "as such." This provision simply means that improper admission of a tax return into evidence shall not be per se reversible. There must still be a showing of prejudice. Otherwise the words "as such" would have no meaning. Here, of course, the use of the tax returns was vital to the prosecution's case.

POINT IV

EVIDENCE OF APPELLANT'S PURCHASES OF SECURITIES WAS ERRONEOUSLY ADMITTED.

The government contends that evidence of Frank Mangan's purchase of \$12,000 worth of securities was admissible without proof of prior impecunity, but in any event the Mangan tax returns

* This provision relates only to use at trial. It does not affect the pretrial disclosure of returns to the Department of Justice.

showed only modest income in 1971 and 1972 so that the acquisition of \$12,000 for securities purchases was sudden and unexplained (GBr 26-27).

The danger of permitting proof of affluence without proof of prior impecunity is unintentionally brought out in the government's own argument. In response to the possibility, pointed out in appellant's brief, that the securities might have been purchased on margin, so that only one-half the purchase price would have been paid in cash, the government states, "No such proof was offered at trial" (GBr 27). Thus the government would shift to appellant the burden of proving that the evidence was not inculpatory.

The recent decision of this Court in Allen v. County Court, ___ F.2d ___ Docket No. 77-2059 (2d Cir. November 29, 1977) demonstrates that such evidence is not only inadmissible, but its use is a denial of due process. Allen was concerned with the New York statute which makes the presence of a firearm in a vehicle presumptive evidence of possession by all passengers. In holding the statute unconstitutional the Court applied the test of Leary v. United States, 395 U.S. 6 (1969), that the presumed fact must flow more-likely-than-not from the facts adduced. The Court also noted, slip opinion at 556, n. 15, that under Barnes v. United States, 412 U.S. 837 (1973) the same test applies to common law inferences.

The Allen opinion (as did the Barnes opinion) left open the question as to whether a standard of proof beyond a reasonable doubt may be necessary, rather than the less severe more-likely-than-not test, slip opinion at 555, n. 14.

It seems clear that in view of Allen and Barnes, cases like United States v. Falley, 489 F.2d 33 (2d Cir. 1973), have lost their viability. Falley held that proof of impecunity was not necessary where there was other evidence of guilt.* Certainly the presence of other evidence of guilt has no relationship to the issue of whether the possession of modest affluence leads more-likely-than-not to a conclusion of guilt. And under no conceivable test does a reasonable inference of guilt flow from such possession.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

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* The case is discussed in greater detail in appellant's principal brief at 39-42.